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ABSTRACT

This brief paper provides an outline for a discussion about the legality of Florida's functional literacy testing program. It defines relevant terms, explains relevant laws, and sets forth the legal basis for the suit and the remedies sought. The discussion is intended to provide a legal and historical framework within which the developments in the suit may be observed knowledgeably.
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THE COURTS AND TESTING:
IS FLORIDA'S FUNCTIONAL LITERACY
TESTING PROGRAM LEGAL?

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of
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PURPOSE OF THIS PAPER

This "paper" is little more than an outline. It is designed to foster discussion at an AERA roundtable session during which, typically, people enter and leave the discussion at will. It is hoped that this outline will allow these transient discussants to listen to the discussion in progress and be able to determine the place of that discussion within the broader topic. It is also hoped that this outline will generate points of discussion.

The discussion, itself, is intended to provide a legal and historical framework within which the developments in the Florida functional literacy test court suit may be knowledgeably observed by an educator.

1. WHAT DOES "LEGAL" MEAN?

A. A functional definition is: Any act is legal which will not be reviewed by a court or, if reviewed, will not be found to be violative of anyone's rights.

B. "Legal" does not necessarily mean "moral" or "good":

Law by itself neither provides the acquisition of (the) understanding of "right action" nor the process of becoming convinced of the wisdom of acting in accord with this understanding. These are educational tasks (Short, 1978, p. 434).

2. WHAT ARE "RIGHTS" AND HOW DO WE GET THEM?

A. Flathman (1976) defined "rights" in this way:

Rights is a legalistic concept. It may be that its prominence, at least in the United States, is to be understood as part of the American tendency... to transmute moral and political questions into legal ones... . Rights are devices for guaranteeing the freedom to act against the incursions both of political authority and of private persons and groups (pp 33, 34).

B. Rights are given by constitutions, statutes and the common law.

3. WHAT CAN WE ASK A COURT TO DO IF IT DETERMINES THAT OUR RIGHTS HAVE BEEN VIOLATED?

A. Remedies: Mayers (1964) provided a good summary:

Diverse as may be civil proceedings, they will be found on examination to fall chiefly into several main categories. The litigant who initiates the proceeding ordinarily asks the court either to (1) merely declare that he possesses certain rights, or (2) prevent a threatened wrong against him, or (3) undo a wrong already done, or (4) in lieu thereof, award him monetary compensation therefor (p.152).

B. Liability: When a plaintiff identifies a defendant and asks the court to apply remedies (2), (3) or (4) above, the plaintiff must show that the acts of this defendant resulted in a violation of the plaintiff's rights. This is not always easy. Beaufait (1977):

Absent any case law in point, we think the most serious problem any plaintiff faces is that of proving causation. A duty exists to educate children and that duty is imposed both by statute and constitution. Given a duty, it is true that liability can arise out of neglect of the duty of a failure to perform substantially as required. But the usual liability arises only where the neglect or breach causes the damage (p.17).

(See also Diamond (1978), p.2).

4. WHAT LEGAL BASES EXIST UPON WHICH A SUIT LIKE THE FLORIDA SUIT MAY BE PRESENTED FOR JUDICIAL REVIEW?

Tractenberg (1978) described six categories of legal provisions relevant to competency testing:

Three are constitutional in origin: federal and state due process clauses; federal and state equal protection clauses; and state education clauses. The fourth is statutory--those provisions of the state's education laws which directly or indirectly bear upon the establishment and operation of a minimum competency program. The fifth is regulatory--relevant policies, rules and regulations of the state education authorities. The sixth is the "common law", legal principles evolved through the litigation process (p.2).

5. WHAT ARE THE LEGAL BASES RELIED UPON IN THE FLORIDA SUIT AND WHAT REMEDIES ARE SOUGHT?

- A. Remedies: The Florida defendants seek declaratory and injunctive relief. That is, they are asking the court to declare that the testing program violates students' rights and, as a result of this declaration, to enjoin the state from conducting the testing program and retaining any record that the plaintiffs failed the test (remedies (1), (2) and (3) in 3-A above).
- B. Legal Bases: The legal bases relied upon are the first, second, fourth and fifth bases described by Tractenberg (see 4 above): federal due process clause, federal equal protection clause, federal statutes and federal regulations. The plaintiffs ask the court to declare that:

The defendants' requirement that members of the plaintiff class pass the Florida Functional Literacy Examination as a prerequisite to receiving a standard high school diploma constitutes a violation of the equal protection and due process clauses to the Fourteenth Amendment to the Constitution of the United States; the Civil Rights Act of 1964 and the regulations promulgated thereunder; and the Equal Educational Opportunities Act of 1974 (Debra P. v. Turlington, Complaint p. 17).

The plaintiffs also ask the court to declare that the Florida statute which requires that the test be passed "is unconstitutional as applied" in that it violates the equal protection and due process clauses of the Fourteenth Amendment. The significance of the words "as applied" lies in the plaintiffs' contention that the test examines skills which were not taught, the test is neither reliable nor valid and the test unfairly penalizes black students who attended segregated schools as recently as the early 1970's.

6. IS THE FLORIDA TESTING PROGRAM LEGAL?

Only the court can decide whether Florida's program is legal. Courts make decisions about laws (their intent and their proper application) and what the true facts are in a given situation. Then the courts apply the facts to the law and decide whether anyone's rights were violated.

7. WHAT WILL BE THE EFFECT OF THE FLORIDA DECISION ON TESTING PROGRAMS IN OTHER STATES?

Note that the decision depends on the facts and that the facts in other states differ from the facts in Florida. Orfield (1979) said cases "can establish a principle but they cannot implement it in more than a handful of specific instances... . (Litigation is a) very indirect, unreliable and inefficient way to change actual administrative practices" (p. 6).

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